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January 18, 2012

SPARROWHAWK V. ZAPOLTINSKY, 2012 ABQB 34

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On January 13, 2012, Madam Justice Shelley of the Alberta Court of Queen's Bench delivered one of the first decisions to consider the substantive provisions of the Minor Injury Regulation. The decision is very plaintiff-friendly, and unless and until the ruling is appealed and overturned, this rather restrictive view of what constitutes a "minor injury" will be a persuasive precedent, which must be considered when assessing risk in settlement negotiations.

In this case, the Plaintiff sustained jaw pain immediately after his rear end accident. The jaw pain was accompanied by popping and grinding sounds. It had not resolved by the time of trial. No MRI was ever performed to determine the structures involved, and whether, in fact, there was any displacement or derangement of the cartilage in the jaw. A jaw x-ray was normal. However, Dr. Thomas testified that the grinding and popping, as well as the aberrant movement of his jaw, suggested joint derangement involving the cartilage. Moreover, there had been some unusual wear to the surface of the Plaintiff's teeth, likely the result of grinding.

As a result of the injury, the Plaintiff had difficulty chewing, yawning and speaking. He could do all these things, but had some difficulty or pain associated with each.

The Court determined that the injury was not a minor one, for three reasons. We provide brief commentary on each one.

A) Tooth and cartilage injuries are not injuries to the muscle tendon, ligament or WAD injuries

We do not disagree with this statement. Both experts agreed that the crepitus might suggest cartilaginous damage. If such can be diagnosed without an MRI (in the expert's opinions) then this finding is consistent with the regulation.

What was concerning in this portion of the decision was the judge's suggestions that dentists don't use terms like sprain or strain, and therefore, the Minor Injury Regulation would not apply. Sprain and Strain are clearly and unambiguously defined in the MIR, and that

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definition should be applied, whether the dentists want to do so or not. In the very next section, Justice Shelley suggests that the Plaintiff's "muscle and ligament" injuries resulted in a serious impairment. If the Plaintiff sustained muscle and ligament injuries, then those are minor injuries, pursuant to the definition, whether they are in the jaw or the neck.

B) In any event, the jaw injury resulted in a serious impairment

Justice Shelley found that the difficulty that the Plaintiff had with yawning, chewing and speaking constituted a physical impairment. She concluded that the substantial inability criteria would be met in any of the following situations:

1. the injury prevents an injured person from engaging in a "normal activity of daily living";
2. the injury impedes an injured person's engaging in a "normal activity of daily living" to a degree that is non-trivial for that person;
3. the injury does not impede an injured person from engaging in a "normal activity of daily living" but that activity is associated with pain or other discomforting effects such that engaging in the activity diminishes the injured person's enjoyment of life.

C) All injuries treated principally by dentists, such as TMD and tooth injury, cannot be minor injuries.

Finally, Justice Shelley determined that because the MIR and DTPR indicates that a Certified Examiner has a comprehensive knowledge of minor injuries, and since dental professions are not included as CEs, then injuries requiring treatment by dental professionals cannot be minor injuries.

This is concerning because it suggests that all jaw injuries, including those that are minor and transient, should be excluded from minor injuries because some dentists might treat the same with a splint. This seems to fly in the face of the clear definitions of sprain and strain in the MIR.

This definition is exceedingly broad. No matter how minor the impairment of an activity, or how minor the chronic pain, the test for serious impairment would be met. The criteria are based on entirely subjective reports that cannot seriously be challenged. Justice Shelly's definition basically limits the minor injury category to all but the most transient injuries. The only real area available to argue will be whether the serious impairment was caused "primarily by the accident".

Conclusion

Generally, this decision has severely restricted the use that can be made by insurance companies and defence counsel of the MIR. According to Justice Shelley's decision, the MIR will never apply to mouth or jaw related injuries, no matter their mechanism of injury, severity or duration. Moreover, the criteria she has expressed for "serious impairment" is so broad and subjective, it would be virtually impossible to challenge on any basis other than causation.

We understand that the Defendant will be appealing this decision. As our readers will recall from *Morrow v. Zhang*, the Charter challenge lawsuit, this will mean further time will pass before we have a Court of Appeal decision on these important issues. In the meantime Sparrowhawk will be persuasive, but not binding, authority in other JDRs and trials where there is an issue of the application of the MIR Cap.

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